



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF A-H-P- INC.

DATE: OCT. 3, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a professional healthcare staffing business, seeks to employ the Beneficiary as a registered nurse supervisor. It requests classification of the Beneficiary as an advanced degree professional under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based “EB-2” immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition on multiple grounds. The Director found that (1) the job offer was not *bona fide*; (2) the Petitioner’s notice of filing did not comply with regulatory requirements; (3) the Petitioner’s educational requirements for the proffered position exceeded the normal requirements for the occupation; (4) the Beneficiary did not have the requisite experience to qualify for the job of registered nurse (RN) supervisor under the terms of the ETA Form 9089 (ETA 9089); and (5) the Beneficiary, as far as the record shows, did not have either a state RN license or proof that she passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN), as required by the ETA 9089.

On appeal the Petitioner submits a brief and additional documentation. Upon *de novo* review of the entire record, including the materials submitted on appeal, we will withdraw the Director’s first three findings and affirm his last two findings. We will dismiss the appeal on the grounds that the Beneficiary, under the terms of the ETA 9089, does not have the requisite experience to qualify for the proffered position and does not have the requisite credential(s).

I. LAW

A. Schedule A Occupation

This petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5(a) for which the Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses. *Id.* Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA 9089 (Application for Permanent Employment Certification) from the DOL prior to filing the

petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS along with an uncertified ETA 9089 in duplicate. *See* 8 C.F.R. §§ 204.5(a)(2) and (k)(4); *see also* 20 C.F.R. § 656.15.

B. Advanced Degree Professional Classification

As defined in 8 C.F.R. § 204.5(k)(2): “*Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master’s degree.” The regulations at 8 C.F.R. § 204.5(k)(3)(i) state that a petition for an advanced degree professional must be accompanied by either:

- (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
- (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

Thus, advanced degree professional classification requires either a U.S. master’s or foreign equivalent degree or a U.S. baccalaureate or foreign equivalent degree plus five years of qualifying experience.

To be eligible for the requested classification a beneficiary must also meet all of the education, training, experience, and other requirements of the ETA Form 9089 as of the petition’s priority date.¹ *See Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Acting Reg’l Comm’r 1977).

II. ANALYSIS

A. Requirements of the ETA Form 9089

The education, training, experience, and other requirements for the proffered position are set forth in Part H of the ETA 9089. In this case Part H has the following relevant entries with respect to the proffered position of registered nurse supervisor:

- | | | |
|------|--|-------------------|
| 4. | Education: Minimum level required: | Bachelor’s degree |
| 4-B. | Major Field of Study: | Nursing |
| 5. | Is training required in the job opportunity? | No |
| 6. | Is experience in the job offered required? | Yes |
| 6-A. | How long? | 60 months |

¹ The “priority date” of the petition is ordinarily the date the underlying labor certification application was filed with the DOL. *See* 8 C.F.R. § 204.5(d). In this case, since the petition did not require a certified ETA 9089, the “priority date” is the date the petition (with the completed but uncertified ETA 9089) was filed with USCIS, which was December 24, 2018.

- 7. Is an alternate field of study acceptable? No
- 8. Is an alternate combination of education and experience acceptable? Yes
- 8-A. What level of education? Master's degree
- 8-C. How much experience? None
- 9. Is a foreign educational equivalent acceptable? Yes
- 10. Is experience in an alternate occupation acceptable? No

11. Job duties –

Supervise RNs, PPNs and CNAs in the provision of general nursing care to patients; demonstrate correct use of medical equipment (monitoring equipment, EKG, IV-drip, etc.) to newly hired nursing staff. Set up work schedules for subordinates. Oversee the conduct of emergency nursing procedures as required by patient symptomatology; take temperature, blood pressure and other vital signs. Serve as resource person to the nursing team in the planning, evaluation, and implementation of nursing care. From time to time, assume floor duties to cover for absent nurses, in addition to overseeing the nursing team.

14 Specific skills and other requirements:

Candidate must have State RN License or have passed the NCLEX

Thus, the ETA 9089 requires either a U.S. bachelor's or foreign equivalent degree in nursing plus five years of experience in the job offered – that is, as a registered nurse supervisor – or a U.S. master's or foreign equivalent degree in nursing with no experience. In addition, the foreign national must have a state license or have passed the National Council's licensure examination.

The evidence of record shows that the Beneficiary has a four-year bachelor's degree from a college of nursing in the Philippines, awarded in April 2006, which we find to be equivalent to a U.S. bachelor's degree in nursing. The record also includes employment certification letters from [redacted] Hospital and Medical Center in [redacted] stating that the Beneficiary was employed as a staff nurse from March 2007 to May 2011, and from [redacted] Medical [redacted] in [redacted] Saudi Arabia, stating that the Beneficiary was employed as a staff nurse 2 from June 2011 to June 2018.

While the Beneficiary's degree meets the ETA 9089's educational requirement of a bachelor's or foreign equivalent degree in nursing, her employment as a staff nurse and staff nurse 2 does not meet the experience requirement of five years as a registered nurse supervisor. The duties of the registered nurse supervisor as described in section H.11 of the ETA 9089 – which include supervising other nurses, demonstrating equipment to newly hired nurses, setting work schedules, overseeing emergency nursing procedures, and serving as a general resource person for other nurses – are clearly and decisively supervisory in nature. In contrast, the duties performed by the Beneficiary at the hospitals in the

Philippines and Saudi Arabia, as described in their employment certification letters, were those of a direct care nurse and did not involve any supervisory duties with respect to other nurses.

Therefore, the Beneficiary's employment as a staff nurse and staff nurse 2 in the Philippines and Saudi Arabia does not constitute experience in the "job offered" (registered nurse supervisor), as required in section H.6 of the ETA 9089. Section H.10 of the ETA 9089 states definitively that experience in an alternate occupation is not acceptable. Accordingly, the Beneficiary is not eligible for the offered position based on the ETA 9089's primary requirements of a bachelor's or foreign equivalent degree in nursing and five years of experience as a registered nurse supervisor. Nor is the Beneficiary eligible under the alternate requirement of a master's or foreign equivalent degree because the Beneficiary has no such degree.

In addition to the shortcomings discussed above, the record does not show that the Beneficiary has either of the credentials required in section H.14 of the ETA 9089. With respect to the state license requirement, the Petitioner has submitted a copy of a document on the letterhead of Continental Testing Services, [redacted] Department [of] Financial and Professional Regulation," dated March 11, 2019, indicating that the Beneficiary had passed an examination in the Philippines on July 26, 2018, and under [redacted] law was entitled to "practice as a License Pending Professional Nurse under direct supervision for a period of three months." The Beneficiary was advised that she "must apply for licensure within 1 year from the date of this notification to the [redacted] **Department of Financial and Professional Regulation** for a license." The Beneficiary's three-month status as a "license pending professional nurse" has now expired, and there is no evidence in the record that she has applied for licensure as directed in the above letter. Nor has the Petitioner shown that licensure in the [redacted] would entitle the Beneficiary to work as a registered nurse in the [redacted] where the Petitioner indicates she would be employed. As for the NCLEX requirement, the Petitioner has submitted one page of a document entitled "Exam Appointment History" which refers to the NCLEX-RN examination, an appointment date of July 26, 2018, in [redacted] California, a registration ID number and a status of "pass." However, the document does not identify the exam-taker.

Thus, the record does not establish that the Beneficiary has either a state RN license or has passed the NCLEX-RN, at least one of which is required in section H.14 of the ETA 9089.

As the Petitioner has not established that the Beneficiary met the experience, license, or examination requirements of the ETA 9089 at the time the petition was filed in December 2018, the ETA 9089 does not support the requested classification of advanced degree professional in accordance with the regulations at 8 C.F.R. §§ 204.5(a)(2) and (k)(4) and *Matter of Wing's Tea House, id.* Therefore, the petition cannot be approved.

B. Petitioner's Ability to Pay the Proffered Wage

To be eligible for the classification it requests for the beneficiary, a petitioner must also establish that it has the ability to pay the proffered wage stated on the ETA 9089. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by [USCIS].

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date of the petition onward. The priority date in this case, as previously indicated, is December 24, 2018. The ETA 9089 states that the wage offered for the job of registered nurse supervisor is \$67,900 per year.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage. In this case, there is no evidence that the Beneficiary has been employed by the Petitioner at any time since the priority date. Therefore, the Petitioner cannot establish its ability to pay the proffered wage based on wages paid to the Beneficiary.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year.

However, when a petitioner has filed other Form I-140, Immigrant Petitions for Alien Workers (I-140 petitions), the Petitioner must establish that its job offer is realistic not only for the instant Beneficiary, but also for the beneficiaries of its other petitions (I-140 beneficiaries). A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). USCIS records indicate that the Petitioner has filed multiple I-140 petitions. Accordingly, the Petitioner must demonstrate its ability to pay the combined proffered wages of the instant Beneficiary and every other I-140 beneficiary from this petition's priority date until the other I-140 beneficiaries obtain lawful permanent resident status. *See Patel v. Johnson*, 2 F.Supp. 3d 108, 124 (D.Mass. 2014) (upholding our denial of a petition where a

petitioner did not demonstrate its ability to pay multiple beneficiaries).² Thus, the Petitioner in this case must establish that its net income or net current assets in a given year are sufficient to pay the proffered wages of the instant Beneficiary and all of its other I-140 beneficiaries, or the difference between their total proffered wages and the wages paid to them.

No evidence has been provided about the Petitioner's other I-140 beneficiaries, their proffered wages, and the wages paid to them, if any. On the current record, therefore, it is not possible to determine the Petitioner's total wage obligations to its I-140 beneficiaries.

Furthermore, even if we had evidence about the other I-140 beneficiaries, it would not be possible to determine the Petitioner's ability to pay its total proffered wage obligations because no form of evidence required by 8 C.F.R. § 204.5(g)(2) – either an annual report, or a federal tax return, or an audited financial statement – has been submitted for the time period after the priority date of December 24, 2018. While the Petitioner has submitted a copy of its 2017 federal income tax return, it does not cover any time period after the priority date.

In any future proceedings, therefore, the Petitioner must submit evidence of its proffered wage obligations to its other I-140 beneficiaries from the priority date of this petition onward, as well as a form of regulatory required evidence – either an annual report, or a federal tax return, or an audited financial statement – for 2018.

The Petitioner may also submit materials in support of the factors discussed in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967). *Sonegawa* allows the Director, as a matter of discretion, to consider the totality of the Petitioner's circumstances in determining its ability to pay the proffered wage.

III. CONCLUSION

The Beneficiary is not eligible for classification as an advanced degree professional because the record does not establish that she met all the requirements of the ETA 9089 at the time the petition was filed. Specifically, the record does not establish that she had five years of experience as a registered nurse supervisor and either obtained a state RN license or passed the NCLEX-RN examination. The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petition has not met that burden.

² The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the instant Beneficiary or the other beneficiary, whichever is later.

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In addition, the record does not establish the Petitioner's ability to pay the proffered wage from the priority date onward. In any future proceedings the Petitioner may submit additional evidence on that issue in accord with our analysis in this decision.

ORDER: The appeal is dismissed.

Cite as *Matter of A-H-P- Inc.*, ID# 6221495 (AAO Oct. 3, 2019)